Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

No. 93-1771

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JOHN CASILLAN,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT,
AMALGAMATED TRANSIT UNION, LOCAL 1001,
MICHAEL GARCIA, RICHARD BAUMAN, ROBERT
GARSIDE, ED RHATICAN, PETE PEREA, BERNIE
SNYDER, GEORGE STANKO, GREGG FISHER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SALLY ZACK WHEELER, ESQ.
(Counsel of Record)
1600 Blake Street
Denver, CO 80202
Telephone: 303/299-2206
Attorney for The Regional Transportation District

PATRICIA A. COAN, ESQ.
Coan and Collyar
1660 Lincoln St.
Denver, CO 80264
Telephone: 303/830-8800
Attorney for Individual Defendants

May, 1994

23 pp

QUESTION PRESENTED

1. Whether Plaintiff's Petition for Issuance of a Writ of Certiorari to review the Tenth Circuit's January 15, 1993, Order and Judgment is timely.

2. Whether the Tenth Circuit abused its discretion in failing to disqualify itself as requested by Plaintiff's counsel.

3. Whether the Tenth Circuit Court of Appeals abused its discretion in affirming the amount of monetary sanctions assessed against Plaintiff's Attorney by the Federal District Court for the District of Colorado.

LIST OF PARTIES

The Parties to the Proceedings below were the Petitioners John Casillan and his attorney David L. Smith, and Respondents Regional Transportation District, Michael Garcia, Ed Rhatican, Pete Perea, Bernie Snyder, George Stanko, Gregg Fisher and the Amalgamated Transit Union, Local 1001.[1]

The Regional Transportation District ("RTD") is a statutory political subdivision of the State of Colorado pursuant to Colo. Rev. Stat. § 32-9-119(1)(a) (1973). The Amalgamated Transit Union, Local 1001, ("ATU") is the recognized exclusive bargaining agent for represented employees at RTD.[2]

---

[1] Petitioners captioned their appeal to the Tenth Circuit "DAVID L. SMITH, Appellant, v. SALLY ZACK WHEELER, PATRICIA A. COAN and LYNNE L. HICKS, Appellees. These named "appellees" are the attorneys of record for the respondents. The Tenth Circuit never recognized these individuals as proper parties.

[2] Instead of filing a responsive brief in the Tenth Circuit Court of Appeals, Defendant/Appellee Amalgamated Transit Union, Local 1001, moved to adopt the answer brief filed by the other defendants. That Motion was granted by the Tenth Circuit in its December 14, 1993, Order and Judgment. Appendix to petition for certiorari at 5a (hereinafter "App.")

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	3
Conclusion	17

TABLE OF AUTHORITIES

Cases Cited:

	PAGE
Applewood Landscape & Nursery v. Hollingsworth, 884 F.2d 1502 (1st Cir. 1989)	16
Braley v. Campbell, 832 F.2d 1504 (10th Cir. (1987)	4
Breed v. Jones, 421 U.S. 519 (1975)	15
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)	10
Coffey v. Healthtrust, Inc., 955 F.2d 1388 (10th Cir. 1992)	4
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)	4
Des Vignes v. Dept. of Transportation, 791 F.2d 142 (Fed. Cir. 1986), *cert. denied,* 479 U.S. 853 (1986)	16
Dunkin v. Louisiana, No. 92-N-293 (D.Colo. December 10, 1992)	9
Fox v. Mazda Corp. of America, 868 F.2d 1190 (10th Cir. 1989)	4
GJB and Associates, Inc. v. Singleton, 913 F.2d 1504 (10th Cir. 1990)	5
Green Construction Co. v. Kansas Power and Light Co., 137 F.R.D. 22 (D.Kan. 1991)	5
Hilgeford v. Peoples Bank, 776 F.2d 176 (7th Cir. 1985), *cert. denied,* 475 U.S. 1123 (1986)	16
Hinman v. Rogers, 831 F.2d 937 (10th Cir. 1987)	10
In re Land v. First National Bank of Alamosa, 943 F.2d 1265 (10th Cir. 1991)	5
In re McIntosh, 137 B.R. 967 (D.Colo. 1992)	10

PAGE

McWhorter v. City of Birmingham, 906 F.2d 674 (11th Cir. 1990) 12

Missouri v. Jenkins, 495 U.S. 33 (1990) 3

Qualls v. Regional Transportation District, No. 91-Z-989 (D. Colo., July 8, 1993) (order) 15

Singer v. Wadman, 745 F.2d 606 (10th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985) 11

Smith v. Freeman, 921 F.2d 1504 (10th Cir. 1987) 4

Spitzweiser-Wittgenstein v. Newton, 978 F.2d 1195 (10th Cir. 1992) 5

White v. General Motors Corp., 908 F.2d 675 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991) 13

White II, 977 F.2d 499 (10th Cir. 1992) 14

Willner v. University of Kan., 848 F.2d 1023 (10th Cir. 1988), *cert denied*, 488 U.S. 1031 (1989) 10

Statutes Cited:

28 U.S.C. § 1254 3

28 U.S.C. § 2101(c) 3

28 U.S.C. § 455(a) 9

28 U.S.C. § 144 10

28 U.S.C. § 1912 16

Other Authorities Cited:

D.C. Colo. LR 602 C (1991) 2

U.S. Const. amend. V 15

Sup. Ct. R. 42.2 6

Fed. R. App. P. 38 6

No. 93-1771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN CASILLAN,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT,
AMALGAMATED TRANSIT UNION, LOCAL 1001,
MICHAEL GARCIA, RICHARD BAUMAN, ROBERT
GARSIDE, ED RHATICAN, PETE PEREA, BERNIE
SNYDER, GEORGE STANKO, GREGG FISHER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is not reported, and is reproduced at page 1a of the Appendix.

STATEMENT OF THE CASE

Plaintiff Casillan ("Casillan") filed his complaint September 27, 1990. First and second amended complaints were filed January 10, 1991 and August 13, 1991 respectively. On December 10, 1991, the district court dismissed all of Plaintiff's claims for failure to state any claim for relief.

During the proceedings Defendant RTD filed a request for Protective Order in response to a request by Plaintiff for personnel files. Notwithstanding the Court's ruling in Plaintiff's favor[3], Plaintiff's counsel filed a Motion for Reconsideration.[4] In addition to denying Plaintiff's Motion for Reconsideration, the magistrate judge awarded attorney fees under then existing Local Rule 602 C[5] of the United States District Court for the District of Colorado.[6]

On January 15, 1993, a panel of the Tenth Circuit affirmed the district court's dismissal of Plaintiff's complaint and award of attorney fees in *Casillan v. RTD, et al.,* (cases numbered 92-1009 and 92-1039, *supra,* rehearing denied). The Tenth Circuit found Casillan's action "groundless from the day of filing" and remanded to the district court solely for a determination of reasonable attorney fees to be assessed against Plaintiff's attorney for pursuing frivolous appeals. Plaintiff's request for rehearing was denied by the Tenth Circuit on February 17, 1993. No petition for writ of certiorari questioning the Tenth Circuit's January 15, 1993 Order and Judgment was filed within the required time limits. As a result, said Order and Judgment have become final and this Court lacks jurisdiction to review the merits of the January 15, 1993, Order and Judgment.

---

[3] The magistrate ruled in favor of Plaintiff finding that Defendant failed to attach part of the supporting documentation required by local court rule.

[4] Specifically, Plaintiff's counsel argued that the magistrate's order was clearly erroneous and contrary to law because it "deprived Plaintiff's counsel of the opportunity to expunge the record of false and defamatory statements" allegedly made by defendant RTD and its counsel.

[5] Rule 602 C expressly states: "parties seeking or responding to a reconsideration of a magistrate's order should expect that attorney fees will be awarded to the prevailing party on such review."

[6] In the order awarding attorney fees, the magistrate judge noted that fees were justified on two grounds: "Not only did the court rule in Plaintiff's favor because it agreed with Plaintiff that defendant failed to attach supporting documentation, but Plaintiff has failed to cite any authority in support of his assertion that the court abused its discretion." (App. 32a-33a)

Following notice, an opportunity to respond, and a two hour hearing on April 9, 1993, the District Court for the District of Colorado, ordered Plaintiff's counsel to pay attorneys' fees totaling $14,481.50 to Defendants' counsel. On December 14, 1993, a panel of the Tenth Circuit affirmed the district court's award of fees. That determination is the subject of this petition for certiorari.

REASONS FOR DENYING THE WRIT

1. PETITIONER'S REQUEST FOR REVIEW OF THE TENTH CIRCUIT'S JANUARY 15, 1993, ORDER AND JUDGMENT IS UNTIMELY.

Petitioner argues jurisdiction under 28 U.S.C. § 1254 for this Court to review the Order and Judgments issued by the Tenth Circuit both on January 15, 1993, and on December 14, 1993.[7](Petition at 2-3). Petitioner's "Conclusion" requests this Court exercise its "power of supervision" over the Tenth Circuit and the district court. (Petition at 29-30). In between, Petitioner recites a litany of unsubstantiated grievances.

Petitions for writ of certiorari in a civil action must be "taken or applied for within ninety days after the entry of such judgment or decree." 28 U.S.C.§ 2101(c). While the filing of a petition for rehearing may toll the applicable period, the 90-day limit is mandatory and jurisdictional. *Missouri v. Jenkins,* 495 U.S. 33 (1990). Accordingly, any issue regarding the Tenth Circuit's January 15, 1993 decision, including its decision to impose

---

[7] The December 14, 1993 Order only affirms the amount of sanctions and/or attorney fees assessed by the district court pursuant to the Tenth Circuit's January 15, 1993 determination.

In a petition for certiorari filed with this court on March 31, 1994, Mr. Smith's attorney described briefly the proceedings in *Casillan* and represented that "On March 14, 1994, Smith submitted a petition for writ of certiorari to this Court by which he seeks review of the *sanctions orders.*" (emphasis added). *In re: David L. Smith,* No. 931547 at 12.

Although Respondents have not been served with a copy of the petition in *In re: David L. Smith* at 17 n.8 to the present petition requests these Respondents oppose such request.

sanctions, is now moot as it is the law of the case. *See Fox v. Mazda Corp. of America,* 868 F.2d 1190, 1194 (10th Cir. 1989).

The standard of review for sanctions or an award of attorney fees is whether the court abused its discretion. *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384 (1990); *Coffey v. Healthtrust, Inc.,* 955 F.2d 1388, 1393 (10th Cir. 1992); *Smith v. Freeman,* 921 F.2d 1120, 1122 (10th Cir. 1990). Sanctions in the form of fees may be awarded against an attorney for conduct that is either intentional or in reckless disregard of the attorney's duties to the court. *Braley v. Campbell,* 832 F.2d 1504, 1512 (10th Cir. 1987).

On January 15, 1993, the Tenth Circuit found Casillan's case "groundless from the day it was filed." The remand to the district court was limited to the determination of the appropriate amount of fees to be awarded.[8] The district court did not have discretion to determine the propriety of the sanctions award

---

[8] The Tenth Circuit ruled:

> Defendants are entitled to some form of compensation for having been dragged so pointlessly through the courts for the past two years. This action has been groundless from the day of filing, and the agonies visited upon the defending parties and their counsel by plaintiff's attorney and his relentless aggressiveness cannot be allowed to go unanswered. Attorneys who confuse misguided zeal and the pursuit of unfounded legal theories for championing the cause of justice must recognize there is a price for their efforts. The cause of justice is not an invitation to batter blameless parties, nor is it a substitute for proper investigation and grounding of legal proceedings. When the lack of preparation rises to the level of marked indifference to or ignorance of the law, as it has in this case, justice demands compensation.
>
> The judgment of the district court is **AFFIRMED**, and the case is remanded for a determination of reasonable attorney fees for each defendant for defending this appeal. Those fees shall be assessed against counsel for plaintiff, but not plaintiff.

(App. 38a-39a).

itself; the Tenth Circuit had already made that determination.[9] As a result, the only issue that may be properly before this Court in a Petition for Writ of Certiorari is the Tenth Circuit's December 14, 1993 determination that the amount of attorney fees awarded by the district court was proper.

2. CASILLAN'S COUNSEL WAS GIVEN AMPLE NOTICE AND SEVERAL OPPORTUNITIES TO RESPOND TO THE FEE REQUESTS.

Plaintiff's counsel contends he never received notice that sanctions might be imposed by the Tenth Circuit on appeal. (Petition at 10). This is incorrect.

Due process requirements are met if the person against whom sanctions are sought has an opportunity to file a responsive brief. *GJB and Associates, Inc. v. Singleton,* 913 F.2d 824, 830 (10th Cir. 1990); *Green Construction Co. v. Kansas Power and Light Co.,* 137 F.R.D. 22, 23 (D. Kan. 1991). Due process is, of course, also duly met if the party against whom sanctions are sought fails to reply to notice that sanctions are requested. *Spitzweiser-Wittgenstein v. Newton,* 978 F.2d 1195, 1204 (10th Cir. 1992) (a criminal case); *In re Land v. First National Bank of Alamosa,* 943 F.2d 1265, 1268 (10th Cir. 1991).

---

[9] The Tenth Circuit described the proceedings:

> This proceeding arises out of an unsuccessful civil rights action litigated by *appellant David L. Smith* as counsel for plaintiff John Casillan. On two prior appeals, this court affirmed the district court's dismissal of the action and its imposition of sanctions. An en banc petition for rehearing and motion to disqualify the author of the adverse order and judgment were also denied. As a sanction for pursuing the frivolous appeals, this court held plaintiff's counsel accountable for attorneys' fees incurred by the opposing parties, and *remanded the matter to the district court for a determination of the appropriate amount. On remand, the district court awarded $4,525.00, $3,269.00 and $6,687.50 to the attorneys representing three sets of defendants-appellees. This appeal followed.* (emphasis added)

(App. 2a-3a).

In its January 15, 1993 Order and Judgment the Tenth Circuit recognized that a request for sanctions had been made by Respondents:

> There is, however, a legitimate sanctions issue before this court. Defendant RTD asks this court to "award RTD costs and attorney fees pursuant to 42 U.S.C. § 1988, Fed. R. Civ. P. 11, Fed. R. Civ. P. 56(g), as well as such other and further relief this Court deems fair and equitable". The named defendants also ask for attorney fees and costs relating to the appeal." (App. 35a-36a).
>
> In their joint answer, defendants maintain that if an appeal of sanctions "is itself frivolous, Rule 38 gives appellate courts ample authority to award expenses." (App. 37a-38a).

Plaintiff's counsel failed to object, or indeed even to respond, to Defendants' requests for costs and attorney fees on appeal.[10]

Plaintiff's counsel further contends that the district court failed to give him notice and an opportunity to be heard when it awarded $14,481.50 in attorney fees against him. (Petition at 18-19). These arguments too are without legal or factual basis.

Upon remand, Plaintiff's counsel received notice of a hearing to be held before Judge Sparr on April 9, 1993. Plaintiff's counsel was served with affidavits setting forth the fees requested

---

[10] Specifically, the named defendant managers and supervisors requested attorney fees and costs in defending against the appeal in their responsive brief (Case No. 92-1009); RTD requested attorney fees and costs in its responsive brief (Case No. 92-1009); and, in their April 8, 1992 joint answer brief (Case. No. 92-1039), both the individual defendants and RTD requested attorneys' fees and costs under Fed. R. App. P. 38. Plaintiff did not file any reply briefs.

by Respondents.[11] A two hour hearing on attorney fees was held April 9, 1993, before Judge Sparr.[12] Plaintiff's counsel repeated the same conclusory allegations he makes in this petition to counter the request for attorney fees. Mr. Smith presented no evidence whatsoever, nor did he provide in his discourse with the district court any specific facts or other information to dispute the fees sought.[13] Counsel was not denied due process. He was given numerous opportunities to respond to respondents' claims for sanctions and fees and, with the exception of baseless conclusory arguments, simply failed to do so.

3. THE TENTH CIRCUIT HAS PREVIOUSLY DETERMINED THAT CASILLAN'S COUNSEL'S PLEADINGS WERE DEVOID OF MERIT.

Mr. Smith claims that no fees should have been assessed against him because he presented colorable claims in his pleadings. (Petition at 23). As previously argued, this issue is moot because the Tenth Circuit's January 15, 1993, order has become final.

---

[11] The district court ordered Respondents to file affidavits detailing the attorney fees expended on appeal. Each of the Respondents served these pleadings on Mr. Smith in advance of the April 9, 1993, hearing. Mr. Smith filed a response and in turn requested attorney fees to be assessed against Respondents. (Petition at 10 n. 5).

[12] Plaintiff's counsel's appendix does not contain a transcript of the April 9, 1993 hearing before Judge Sparr. That hearing lasted over two hours and was designated by RTD as part of the additional record on appeal to the Tenth Circuit. Plaintiff's counsel never responded to RTD's designation. RTD requested an order requiring Plaintiff to include this transcript as part of the record. The Tenth Circuit in their December 14, 1993 Order and Judgment denied RTD's motion "as moot in light of our disposition of this matter." (App. 5a).

[13] With his client sitting silently beside him at counsel table, Mr. Smith did argue that his client might well be the proper party to pay any fees assessed. Nevertheless, Mr. Smith provided no evidence whatsoever of the relative fault between him and his client, nor did he present any evidence of the chilling effect any assessment might have upon civil rights practice in the Tenth Circuit.

The Tenth Circuit has determined previously and finally that there was no merit whatsoever to Plaintiff's complaint, just as there was no merit to his prior frivolous appeals or to the within frivolous petition for writ of certiorari. In responding to Plaintiff's counsel's arguments, the Tenth Circuit said, *inter alia*, "Mr. Casillan's complaint is devoid of *any facts* from which this court could surmise that a constitutionally protected liberty or property right was violated" (App. 18a-19a); "Plaintiff's complaint, moreover, is full of unsubstantiated, generalized, factual allegations which do not give Defendants *any* notice of the grounds upon which Plaintiff's claims are based" (emphasis added) and "[A]ll the claims in the complaint are disposable due to their legal inadequacy." (App. 19-21a); and,

> Plaintiff's Title VII claim also fails because Plaintiff alleges no facts to support a causal connection between his EEOC claims and his termination or retaliatory motives on the part of the named Defendants. Finally, Plaintiff's privacy, property, and liberty claims under the First, Fourth, Fifth, Ninth and Fourteenth Amendments are not actionable because the complaint fails to state specific constitutional rights which were violated or factual support for those claims. (App. 22a-23a).

Counsel's speculation and his wishful thinking are not a substitute for his duty as an officer of the court.[14] This petition is but another example of Plaintiff's counsel's exhibition of extreme disregard for the rulings of the Federal Courts.[15]

---

[14] In determining that sanctions were appropriate in this case, the Tenth Circuit stated: "It is difficult to believe that the many legal misrepresentations and unsubstantiated, conclusory allegations contained in plaintiff's pleadings are unintentional."
(App. 36a).

[15] Petitioner was ordered to pay the sanctions *or to contact respondents* to make arrangements to pay sanctions within thirty days of the District Court's Order. An Order to Show Cause was issued only after *Petitioner admitted* he had not paid the amounts assessed and *had not made any effort whatsoever to contact respondents* as ordered. Shortly before the contempt hearing, Petitioner filed another Motion to Disqualify the District Court. That Motion remains pending.

4. UNSUBSTANTIATED CLAIMS THAT A JUDGE IS BIASED ARE INSUFFICIENT CRITERIA FOR RECUSAL UNDER 28 U.S.C. § 455(a).

Plaintiff's counsel has filed numerous motions to disqualify judges in this district and the Tenth Circuit not only in the course of this proceeding but also in the course of other recent litigation[16]. These motions have generally accused the courts of bias and lack of impartiality and have generally been filed, as in this case, after sanctions have been ordered or an opinion has been rendered adverse to Plaintiff's counsel or his client.

In the present case, Plaintiff, although moving to disqualify the attorney for the ATU and suggesting that RTD's attorney should disqualify herself, made no attempt to disqualify *any* judge, whether district or appellate until *after* obtaining an adverse opinion from the Tenth Circuit Court of Appeals on January 15, 1993. Then, for the first time, Plaintiff filed a motion demanding that the author of that opinion, Circuit Judge John P. Moore, recuse himself under 28 U.S.C. § 455(a). For the first time Plaintiff questioned Judge Moore's impartiality because Judge Moore authored orders and judgments affirming rulings of the district court and criticized the conduct of Plaintiff's counsel. Similarly, no motion to recuse Judge Sparr was made until *after* remand by the Tenth Circuit with direction to assess attorney fees incurred by Defendants in defending Plaintiff's appeal personally against David Smith.

---

[16] In *Duncan v. Louisiana Pacific*, No. 92-N-293 (D. Colo.), Judge Nottingham, on December 10, 1992, ordered Plaintiff's counsel to pay Defendant $1,807.93 in attorneys' fees and costs by 12/16/92. On December 16, 1992, Plaintiff filed a motion to recuse Judge Nottingham.

In the same case, on July 17, 1992, David Smith was ordered to pay $4,060.00 personally to defendant's counsel plus the costs of a transcript.

Smith appealed both orders and was sanctioned by the Tenth Circuit on February 11, 1993, which said "Sanctions are appropriate in this case. Counsel for the Plaintiff not only pursued appeal No. 92-1230 after he was informed by this court of a jurisdictional defect but also filed another appeal with the identical defect." (*Id.*, Case Nos. 92-1230 and 92-1381).

Judge Moore refused to recuse himself:

> A judge must recuse under 28 U.S.C. 455(a) when a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality. *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992) (quoting *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987)). Ruling adverse to a party is not an act of bias requiring recusal. *Glass v. Pfeffer*, 849 F. 2d 1261, 1268 (10th Cir. 1988).

By order filed February 17, 1993, Plaintiff's petition for review of Judge Moore's decision was denied. Plaintiff's request that the entire three judge appellate panel disqualify themselves was also denied.

Although the affidavits required under 28 U.S.C. § 144 are not required under § 455(a), a request for recusal must still be accompanied by a recitation of *facts* which would support a finding of bias or lack of impartiality. As in this petition, petitioner relies not on facts, but rather on the argument that the pertinent members of the Tenth Circuit are biased against Plaintiff, his attorney and his civil rights case because the Court ruled adversely to their interests.

Here there was no reason for either the district court or the Tenth Circuit to recuse. "The test is whether a reasonable person, *knowing all the relevant facts*, would harbor doubts about the judge's impartiality" not whether an attorney dislikes an adverse ruling. *In re McIntosh*, 137 B.R. at 967, 970 (D. Colo. 1992), (emphasis added). "[I]n deciding whether to recuse, 'there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.' " *In re McIntosh*, 137 B.R. at 970, (quoting *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987)).

A court "should not recuse [itself] on [the] unsupported, irrational or highly tenuous speculation" of Plaintiff and his counsel. *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987). *See also, Willner v. University of Kan.*, 848 F.2d 1023, 1027 (10th Cir. 1988), *cert. denied*, 488 U.S. 1031 (1989) (recognizing that an

unsubstantiated suggestion of personal bias or prejudice is insufficient to mandate recusal under § 455(a) and stating "that a judge ha[s] a duty *not* to recuse himself on unsupported speculation.").

Plaintiff presented no facts whatsoever which would warrant recusal under 28 U.S.C. § 455(a). His only complaints were of adverse rulings. Under these circumstances, the court was obligated not to recuse.

6. THE DISTRICT COURT'S CORRECT RULINGS AGAINST PLAINTIFF AND HIS COUNSEL ARE NOT VALID REASONS FOR RECUSAL UNDER 28 U.S.C. § 455(a).

Plaintiff's counsel appears to argue that consistent adverse rulings provide a basis for recusal in this case. This argument too is without merit.

> As a general rule, recusal under 455(a) must be predicated on extra-judicial conduct. . . . *Consistent adverse rulings, without more, is not a reason for recusal, even if the court made legal errors*. . . . Likewise, friction between the court and counsel or antipathy to an attorney are also insufficient grounds for recusal. . . . However, there is an exception to the requirement of extra-judicial bias when "such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party."

In re McIntosh, 137 B.R. at 970 (emphasis added) (citations omitted). *See also, Hinman*, 831 F.2d at 939 ("A judge should not recuse himself on unsupported, irrational, or highly tenuous speculation"); *Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985) (affirming the district court's refusal to recuse under 28 U.S.C. § 455(a), in part, because "the various remarks made by the district judge during the course of the proceedings do not, as counsel suggests, substantiate the claim of bias or prejudice [and] [o]n the contrary, . . . the district judge exhibited commendable patience and restraint throughout this admittedly and understandably

emotional affair."); and *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) ("Ordinarily, a judge's rulings in the same or related case may not serve as the basis for a recusal motion.").

Taking Plaintiff's counsel's unsupported allegations as true solely for purposes of argument, they are, nevertheless, insufficient as a matter of law to support recusal. "Consistent adverse rulings, without more, is not a reason for recusal." *In re McIntosh*, 137 B.R. at 970.

7. DEFENDANTS' COUNSEL HAVE MET THE *CHRISTIANSBURG* AND *WHITE* STANDARDS FOR AN AWARD OF FEES.

Plaintiff's counsel argues that the fee award was an abuse of discretion because it was in an amount greatly in excess of the minimum that would adequately serve to deter any undesirable behavior (Petition at 25); that it would chill civil rights litigation (Petition at 27); because there was no specific finding regarding relative fault between him and his client (Petition at 28); and the "monetary sanctions against Mr. Casillan's attorney [were] in an amount that he is financially unable to pay." (Petition at 29). In addition, for the first time, and without citation of authority, Petitioner argues: "The Tenth Circuit subjected Mr. Casillan's attorney to double punishment for the same conduct by suspending him from the practice of law in the Tenth Circuit until all sanctions imposed against him . . . are paid." (Petition at 29).

a. Plaintiff's complaint and appeals were not only objectively unreasonable, but as they were fact-less and without any legal foundation, met the higher *Christiansburg* frivolous standard.

Plaintiff's counsel claims any award of fees would chill the filing of civil rights suits. In *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978), the Court said that to award fees to a prevailing Defendant, "[t]he district court must find that the Plaintiff's action was frivolous, unreasonable or without foundation even though not brought in subjective bad faith."

The Tenth Circuit commented on the "many legal misrepresentations and unsubstantiated, conclusory allegations" in Plaintiff's pleadings and found they were not "unintentional." (App. 36a). The Court recognized that Plaintiff had dragged respondents "pointlessly through the courts for the past two years" and that "the cause of justice is not an invitation to batter blameless parties, nor is it a substitute for proper investigation and grounding of legal proceedings." (App. 38a-39a).

The standard is one of objective reasonableness. *White v. General Motors Corp.*, 908 F.2d 675, 680 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991). There can be no question from a review of its January 15, 1993 Order and Judgment that the Tenth Circuit has determined Plaintiff's counsel's conduct to be objectively unreasonable, frivolous, and "groundless from the day of filing." (App. 38a).

b. The Tenth Circuit has already ruled that fees were to be assessed against counsel for Plaintiff but not Plaintiff.

Counsel argues an abuse of discretion because no relative fault was assessed. As discussed *supra* n.13, Plaintiff's counsel presented no evidence whatsoever in support of his claim.

The responsibility for conducting proper legal investigation and research and drafting legal pleadings is for the Plaintiff's lawyer. Here, the complaint was dismissed for failure to state a cause of action, the court ruling that "all the claims contained in the complaint are disposable due to their legal inadequacy." (App. 21a). Further the Tenth Circuit stated, "It is difficult to believe that the many *legal misrepresentations* and unsubstantiated, conclusory allegations contained in plaintiff's pleadings are unintentional." (Petition at 36a) (emphasis added). *See also* discussion quoted at n. 8.

Interestingly enough, Mr. Smith, despite claiming that his client might well bear the blame for the many "legal misrepresentations" discussed by the Tenth Circuit, continues to represent Mr. Casillan. If this were indeed a viable issue, it is obvious that a conflict of interest exists between attorney and client such

that Mr. Smith should have withdrawn from any further representation. Nonetheless, Mr. Smith continues to represent Plaintiff lending further support to the argument that any responsibility for the legal misrepresentations belongs solely to Plaintiff's counsel.

d. Plaintiff's counsel should be sanctioned to the fullest extent of this Court's powers because of his history of noncompliance with prior sanction orders.

Cooter & Gell v. Hartmarx Corp, 496 U.S. 384 (1990), as adopted by the Tenth Circuit in *White, supra* held the purpose of sanctions is deterrence and the amount levied must be upon the person responsible for the violation.

Casillan's counsel contends the fee award was excessive and not the minimum required to deter his conduct. (Petition at 25). This argument is without merit under *White.*

In *White II,* 977 F.2d 499, 502 (10th Cir. 1992), the 10th Circuit said that "the growing list of cases involving sanctions against this attorney is relevant history and may be considered to determine the appropriate sanctions to impose here."

Here, despite previous sanctions by the 10th Circuit and by several judges in the district court, Mr. Smith's conduct has been and continues to be objectively unreasonable and vexatious. As Chief Magistrate Judge Abram noted in the text of a recent sanction against Mr. Smith:

> Plaintiff's counsel is no stranger to sanctions. This Court has sanctioned him. The Tenth Circuit has sanctioned him (*Casillan, supra*), Judge Weinshienk has sanctioned him, Judge Babcock has sanctioned him, (*DeHerrera v. City and County of Denver,* No. 90-B-260 (D. Colo. Feb. 4, 1993)), Magistrate Judge Schauer has sanctioned him (*Casillan v. Regional Transp. Dist.,* No. 90-S-1722 (D. Colo. Aug. 30, 1991)), and Judge Sparr has sanctioned him (*Id.*) Obviously, as this Court has noted, sanctioning Plaintiff's counsel has little effect on his litigation tactics and behavior. Rep. Trans. at 25 (May 26, 1993). Notwithstanding past failed attempts at deterrence, this

> Court believes that only by forcing Plaintiff's attorney to *pay* fees and costs will he change his ways.

Qualls v. Regional Transportation District, No. 91-Z-989 (D. Colo., July 8, 1993 (order) filed in the Tenth Circuit.

Despite severe warnings, Plaintiff's counsel persists in attempts to vex and aggravate the undersigned counsel as again exemplified by his naming counsel as Defendants in one appeal. *Supra* n.1. This unnecessary and improper tactic is but another example of Plaintiff's counsel's antipathy toward procedural rules and the requirements of proper pleading.

Without citation of applicable legal authority or facts, Plaintiff's counsel repeatedly argues that court rulings are simply wrong. His disdain for the federal courts in this jurisdiction is well documented by his sanctions history. He acknowledges that over $50,000 in sanctions have been imposed against him. (Petition at 16 n.8). Obviously $14,481.50 is not enough to deter his conduct as evidenced by this frivolous petition for certiorari.

e. Plaintiff's argument that he is being subjected to double punishment is without merit.

Without citation of authority Plaintiff alleges he is being subjected to double punishment by virtue of the sanctions imposed in this case and the disciplinary suspension from practice in the Tenth Circuit until such time as all sanctions are paid. (Petition at 29).

It is difficult, if not impossible, to discern from the petition the legal theory upon which Plaintiff's counsel depends. Any reliance, however, on the Fifth Amendment provision that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb" is inapplicable since the Constitution's double jeopardy clause is applicable only to criminal proceedings. *See, e.g., Breed v. Jones,* 421 U.S. 519 (1975).

8. RESPONDENTS SHOULD BE AWARDED ATTORNEYS' FEES AND COSTS PURSUANT TO SUP. CT. R. 42.2. FOR THE FILING OF A FRIVOLOUS PETITION FOR WRIT OF CERTIORARI.

Rule 42.2 of the Rules of the Supreme Court of the United States reads in pertinent part as follows: "When a petition for a

writ of certiorari . . . is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant, or applicant, or against the party's attorney or against both."

An appeal is frivolous if no authority is cited in support, *Hilgeford v. Peoples Bank,* 776 F.2d 176 (7th Cir. 1985), *cert. denied,* 475 U.S. 1123 (1986); if bald assertions are made without factual or legal support, *Des Vignes v. Dept. of Transportation,* 791 F.2d 142 (Fed. Cir. 1986), *cert. denied,* 479 U.S. 853 (1986); or, if an appeal is directed at decisions made which were within the court's discretion, *Applewood Landscape & Nursery v. Hollingsworth,* 884 F.2d 1502 (1st Cir. 1989). *See also* cases cited in *Braley,* 832 F.2d at 1513.

Rule 42.2 is the counterpart of Rule 38 of the Federal Rules of Appellate Procedure and complements the provisions of 28 U.S.C. § 1912 which provides: "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

The assessment of costs occurred after the hearing of April 9, 1993. Plaintiff's counsel was ordered to make payment or contact respondents to make arrangements. After his admission that he made no contact whatsoever with respondents, an order to show cause was issued. In order to avoid the scheduled hearing, counsel requested the district court disqualify itself under § 455(a).

While the sanctions imposed in those other cases referred to by the Tenth Circuit in *In Re: Smith* were the result of interlocutory appeals, the judgment in Casillan was final prior to the award of appellate sanctions; and therefore, counsel's legal justification for non-payment argued in *In Re: Smith* is completely inapplicable. In addition, the award of sanctions affirmed by the Tenth Circuit on January 15, 1993, as a result of the improper use of Motions for Reconsideration remains unpaid.

The appendix attached to the Petition contains no more than the decisions rendered by the Tenth Circuit on January 15, 1993 and December 14, 1993. There is absolutely no factual

support in the Petition for any of the statements contained in Counsel's argument. Instead, rather than a legal analysis which would demonstrate why this Court should issue a writ of certiorari, the Petition contains a litany of disjointed complaints against the lower court as well as misstatements of law and fact. Quite simply, this filing is no more than an attempt to evade the consequences of counsel's own actions, delay payment of sanctions properly awarded, contest related disciplinary proceedings, relitigate final judgments, and, as the Tenth Circuit succinctly pointed out, "batter blameless parties."

Consequently, sanctions under Rule 42.2, including the award of double costs, are appropriate.

CONCLUSION

Respondents have been the object of Mr. Smith's baseless pleadings since September 1990, when he filed the first fact-less complaint. They were subjected to numerous unfounded pleadings, including tedious discovery disputes and numerous motions for reconsideration, followed by two appeals which lacked any foundation. Thus, the Tenth Circuit's sanctions against Mr. Smith and the trial court's assessment of reasonable fees were proper and appropriate.

Petitioner's petition for review of the sanctions award is without any supportable basis, justifying the award of further sanctions.

Respectfully submitted,

SALLY ZACK WHEELER
(Counsel of Record)
Attorney for Respondent
Regional Transportation District
PATRICIA A. COAN
Attorney for
Individual Respondents